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76-5091

Supreme Court, U. S.
FILED
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Supreme Court of the United States

OCTOBER TERM, 1976

No.

THE SINGER COMPANY,

Petitioner,

against

PERMA RESEARCH & DEVELOPMENT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MERRELL E. CLARK, JR.
WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street
New York, New York 10005
Attorney for Petitioner

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PERMA RESEARCH & DEVELOPMENT COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Singer Company (hereinafter "Singer"), seeks a writ of certiorari to review a Judgment of the United States Court of Appeals for the Second Circuit affirming a Judgment of the United States District Court for the Southern District of New York awarding Respondent, Perma Research & Development Company (hereinafter "Perma"), damages and interest in the amount of $6,905,376.69.

OPINIONS BELOW

The Opinion of the District Court after trial, dated April 11, 1975 is reported at 402 F. Supp. 881 (S.D.N.Y. 1975), and printed as Appendix G, pp. 51a-125a. The majority Opinion of the Court of Appeals, dated July 1, 1976, written by Mr. Justice Clark affirming the Judgment of the District

Court is presently unreported and printed as Appendix J, pp. 130a-139a. The dissenting Opinion is printed as Appendix J, pp. 139a-165a.*

JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed was entered on July 1, 1976. Orders of the Court of Appeals denying Singer's timely Petition for Rehearing or for Rehearing In Banc were entered on September 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

THE QUESTION PRESENTED FOR REVIEW

Only in an Alice-in-Wonderland world would the result below seem possible. A $7,000,000 judgment was rendered against Singer for breach of an obligation (held to have been *implied,* because it was concededly not expressed in the detailed written contract) to perfect an unsafe and defective "anti-skid device" which the District Court found could have been perfected and successfully marketed despite the fact that (1) no models, no specifications, no drawings and no verbal descriptions existed of the hypothetical "perfected" device and (2) anti-skid devices with

*Singer's first Motion for Summary Judgment was denied by the District Court on March 29, 1968 in an unreported Opinion which is printed as Appendix A, pp. 1a-14a. This Opinion was affirmed by the Court of Appeals in an Opinion dated April 25, 1969, reported at 410 F.2d 572 (2d Cir. 1969), which is printed as Appendix C, pp. 18a-31a. Singer's second Motion for Summary Judgment was denied by the District Court in an Opinion and Order dated January 27, 1970, reported at 308 F. Supp. 743 (S.D.N.Y. 1970), which is printed as Appendix E, pp. 34a-46a. Singer's third Motion for Summary Judgment was denied by the District Court in an unreported Opinion and Order dated May 14, 1970, which is printed as Appendix F, pp. 47a-50a.

electronic improvements had admittedly been produced for sale by others but none had ever been sold in the principal market. Appendix G, pp. 82a, 88a.

What accounts for this astonishing result? We submit that the villain is a computer running amok.

The District Court's holding on both liability and damages was necessarily and expressly based upon the results of computer simulations prepared by Perma especially for trial. As stated in the dissenting Opinion below, "plaintiff's [Perma's] entire case rests upon the accuracy of its computerized calculations . . . ." Appendix J, p. 162a (dissenting Opinion). The results of the computer simulations were received in evidence, over objection, despite Perma's persistent refusal to disclose the "program" which controlled the computer's calculations.

The question presented for review is: did the Court of Appeals commit error in affirming the District Court's admission in evidence, over objection, and reliance upon the results of computer simulations prepared specifically for the purposes of trial where the proponent of the computer simulations refused to disclose the all-important computer program?

STATEMENT OF THE CASE

Singer had purchased from Perma the rights to certain patents on an "anti-skid device" for use on automobiles. The anti-skid device, however, was neither workable nor marketable when the patents were assigned, and Singer eventually abandoned its efforts to manufacture and market the device. Perma brought suit for lost prospective royalties alleging that Singer had failed to perform an implied contractual obligation to use its best efforts to perfect the device and make it marketable. Jurisdiction lay in the District Court under 28 U.S.C. § 1332(a)(1) (1970).

As an essential element of its case, Perma had to prove that the anti-skid device could have been perfected to the point where it possessed commercial utility. To meet this burden, Perma prepared computer simulations specifically for use at trial which purported to show the performance of a "perfected" anti-skid device incorporating unspecified engineering changes which Perma's expert thought would have made the device workable.

Basing his opinion on the results of these computer simulations, Perma's expert testified that the device could have been perfected and made commercially successful. Although preparation of the computer simulations by Perma's experts had commenced long before trial, Singer first learned of their existence when the results thereof were offered in evidence after two months of trial.

Singer objected to admission of the results of the computer simulations without disclosure of the computer program and moved that the program be disclosed. Perma refused to disclose the computer program and the District Court would not order it to do so. Singer then moved to strike the computer simulations and the exhibits and testimony based thereon. The District Court, after a one month delay, denied the motion to strike without explanation and refused to grant Singer time in which to prepare and offer computer simulations of its own.

The District Court held that the anti-skid device was perfectible and marketable and awarded damages of approximately $7,000,000. The only evidence cited in support of this ruling was the expert testimony proffered by Perma, which the District Court said had been received "on the basis of the computer simulations. . . ." Appendix G, p. 82a.

On appeal, Singer contended that this holding was erroneous since (a) failure to disclose the computer program rendered the computer simulations inadmissible for lack of foundation; and (b) failure to disclose the computer program deprived Singer of its right to meaningful cross-examination of Perma's experts.

The Court of Appeals affirmed. The majority Opinion by Mr. Justice Clark held (a) that disclosure of computer programs, admittedly containing the "data and scientific formulae employed", is not a required foundation for admission of the results of computer simulations; and (b) that disclosure of computer programs is not necessary to effective cross-examination of witnesses stating the results of computer simulations. Appendix J, pp. 136a-137a.

Judge Van Graafeiland in a vigorous dissent stated that the District Court's failure to require disclosure of the computer program "required defense counsel to attack the credibility of plaintiff's proof with one hand tied behind his back. . . ." Appendix J, p. 158a (dissenting Opinion). He added, "[a]s courts are drawn willy-nilly into the magic world of computerization, it is of utmost importance that appropriate standards be set for the introduction of computerized evidence." Appendix J, p. 158a (dissenting Opinion).

REASONS FOR GRANTING THE WRIT

This Court should now review the decision of the Court of Appeals because:

(a) The holding that computer-generated evidence created specifically for purposes of litigation is admissible, over objection, without disclosure of the computer program renders a decision on an important question of Federal law which has not been, but in light of the ever increasing importance of computer-generated evidence in Federal Courts, should be settled by this Court.

(b) The holding that computer-generated evidence created specifically for purposes of litigation is admissible, over objection, without disclosure of the computer program is in conflict with decisions of other Courts of Appeal holding that disclosure is necessary to proper foundation and to meaningful cross-examination.

A.

The Proper Administration of Justice Requires that Basic Standards Be Set by This Court To Govern the Increasing Use of Computerized Evidence, Including Specifically the Mandating of Disclosure of the Computer Program

1. There Is a Compelling Need for Proper Standards

It is well recognized both that computers will be increasingly used to provide evidence in trials and that their potential for producing useful evidence is matched by their potential for dangerous misuse:

> "Although the computer has tremendous potential for improving our system of justice by generating more meaningful evidence than was previously available, it presents a real danger of being the vehicle of introducing erroneous, misleading, or unreliable evidence. The possibility of an undetected error in computer-generated evidence is a function of many factors: the underlying data may be hearsay; errors may be introduced in any one of several stages of processing; the computer might be erroneously programmed, programmed to permit an error to go undetected, or programmed to introduce error into the data; and the computer may inaccurately display the data or display it in a biased manner. Because of the complexities of examining the creation of computer-generated evidence and the deceptively neat package in which the computer can display its work product, courts and practitioners must exercise more care with computer-generated evidence than with evidence generated by more traditional means." Roberts, *A Practitioner's Primer on Computer-Generated Evidence,* 41 U. CHI. L. REV. 254, 255-56 (1974) [hereinafter cited as *"Computer-Generated Evidence"*].

The growing problem of computer-generated evidence has been recognized in the *Manual for Complex Litigation:*

> "The rapid rate of technological development and the expanding range of applications of computers suggest that the problems are still in their infancy, and that the importance of computer based evidence can only increase with the passage of time." Federal Judicial Center, *Manual for Complex Litigation* § 2.714 (1973) [hereinafter cited as *"Manual for Complex Litigation"*].
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> "The spectacular developments in the use of computers including electronic data processors in the fields of science, industry, government and the professions have created unanticipated problems in the discovery and reception in evidence of computer processed data." *Manual for Complex Litigation* § 2.70.
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> "The legal profession in recent years has been confronted with the continuing problem of accommodating the rules of evidence to technological changes in our society. The difficulties in determining the admissibility of such evidence as x-rays, radar speed tests and lie detector tests are dwarfed by the new problems which have been created by the advent and increased use of electronic data processing and storage machinery." *Manual for Complex Litigation* § 2.714

As Judge Van Graafeiland noted in his dissent below, "[j]udicial decisions to date have largely skirted the edge of the problem because they have been concerned mainly with computerized records made in the regular course of business." Appendix J, p. 159a (dissenting Opinion). Under such circumstances, knowledge of the computer program is of less importance because the trustworthiness of the results of a computer's operation is authenticated by the fact that they are relied on daily in the course of business.

When a computer is programmed to produce evidence specifically for trial, however, there is no inherent guarantee of trustworthiness. *United States* v. *Baxter,* 492 F.2d 150, 165 (9th Cir. 1973), *cert. denied,* 416 U.S. 940 (1974); *W. D. Rubright Co.* v. *International Harvester Co.,* 358 F. Supp. 1388, 1403 (W.D. Pa. 1973). In cases similar to the one at bar, knowledge of the computer program is absolutely essential both as a proper foundation for the evidence and to permit meaningful cross-examination of witnesses testifying about the results of a computer's operations.

2. The Computer Program Is of Central Importance

A computer is a "machine [which] basically can do only what humans instruct it to do. . . ." *Manual for Complex Litigation* § 2.717. The instructions are contained in computer programs "which direct the hardware in its analysis of data. . . . " Note, *Computer Software: Beyond the Limits of Existing Proprietary Protection Policy,* 40 BROOKLYN L. REV. 116, 117 (1973). Computer programs have been described by Chief Judge Brown of the Court of Appeals for the Fifth Circuit as:

> ". . . the intricate step-by-step directions given to the computer concerning everything the computer is expected to do with respect to the data fed into it." Brown, *Electronic Brains and the Legal Mind: Computing the Data Computer's Collision With Law,* 71 YALE L.J. 239, 243 (1961).

The computer program, which contains the "logic" and mathematical and scientific assumptions of the computer simulations, "more than any other component of the computer system, reflects the skills and creativity of an individual or individuals." *Computer-Generated Evidence,* 41 U. CHI. L. REV. at 260. As computer programs are written by humans, so are they subject to human error. And any logical errors or false assumptions in the computer program which controls the computer in its analysis of the data will almost certainly create error in the result.

> ". . . [T]*he computer can only process the data as it is told to process the data;* if there is a deficiency in the manner in which the computer is told to process the data, the output will be in error." *Computer-Generated Evidence,* 41 U. CHI. L. REV. at 263 (italics in original).

". . . [I]t usually is not possible to determine whether the computer is properly programmed by examining the answers obtained." *Reeves Instrument Corp.* v. *Beckman Instruments, Inc.,* 444 F.2d 263, 264 (9th Cir.), *cert. denied,* 404 U.S. 951 (1971). In the case of Perma's unvalidated computer simulations* prepared specifically for purposes of litigation, the accuracy of the results could be ascertained only through a thorough examination of the computer program and testing of the logic and assumptions contained therein, for:

> "If the programs are in error, incomplete, not designed to process all of the data that might be generated, or lacking appropriate verification and test procedures, *errors in the output will result." Computer-Generated Evidence,* 41 U. CHI. L. REV. at 269 (italics ours).

Without the foundation of the computer program, the results of Perma's computer simulations, like the program which created them, are nothing but "hypothetical, untested and unproven" Appendix J, p. 154a (dissenting Opinion) exercises in " 'an area of pure physics and delightful math'."

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* Under generally accepted practice, the results of computer simulations are not relied upon until they have been "validated" or been proven accurate by comparing the results of the simulation against real-world data obtained through prototype testing. Appendix J, pp. 152a-54a (dissenting Opinion). Perma never validated the results of its computer simulations claiming that it could not afford the cost of constructing and testing a prototype incorporating the design changes its experts thought Singer's engineers should have made.

Appendix J, p. 152a (dissenting Opinion) *quoting* the District Judge. Yet the Court of Appeals held that a $7,000,000 judgment may be sustained precisely upon these unfounded results.

We submit that the views expressed by Judge Van Graafeiland in his dissent below are correct:

> "Because the record in this case contains no information about the programming relied upon by plaintiff's [Perma's] experts, neither we [the Court] nor defense counsel have any way of knowing whether it was complete or accurate." Appendix J, p. 161a (dissenting Opinion).
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> "Although the admissibility of evidence is ordinarily for the trial court, where, as here, plaintiff's [Perma's] entire case rests upon the accuracy of its computerized calculations, the refusal of the District Judge to subject such computations to the searching light of full adversary examination constitutes prejudicial error which mandates reversal." Appendix J, p. 162a (dissenting Opinion).

B.

The Decision Below Conflicts with Decisions of Other Courts of Appeal Which Hold that Disclosure of the Computer Program is Necessary as a Proper Foundation for Computer-Generated Evidence and for Meaningful Cross-Examination

1. Other Circuits Require Disclosure of Computer Programs as Foundation

It has been widely recognized that while computerized studies and analyses are becoming increasingly valuable sources of evidence in Federal Courts, *Manual for Complex Litigation* § 2.714, "electronically recorded and processed data must be given special treatment far in advance

of trial in order to insure fairness in its use, to permit ascertainment of its reliability, and to avoid suprise and delay." *Manual for Complex Litigation* § 2.70.

Other Courts of Appeal have carefully placed upon proponents of computer-generated evidence the burden of laying a foundation that the evidence which they offer is reliable, accurate and trustworthy. *United States* v. *Liebert*, 519 F.2d 542, 547 (3d Cir.), *cert. denied*, 96 S. Ct. 392 (1975); *United States* v. *Russo*, 480 F.2d 1228, 1241 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *United States* v. *DeGeorgia*, 420 F.2d 889, 893 n.11 (9th Cir. 1969); *United States* v. *DeGeorgia*, 420 F.2d 889, 895-96 (9th Cir. 1969) (Ely, J., concurring).

A foundation of reliability and trustworthiness for computer-generated evidence created for purposes of litigation must be established either by disclosure of the computer program and other input materials, or by giving the adverse party access to the programmed computer. *United States* v. *Liebert*, 519 F.2d at 547; *Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co.*, C.A. No. 71-H-778A at 31 (S.D. Tex., filed May 3, 1976); *Manual for Complex Litigation* § 2.717; *see United States* v. *Russo*, 480 F.2d at 1242-43.

In the case at bar, however, the Court of Appeals held otherwise. Its holding is based upon the astonishing conclusion that "delivery of the actual computer programs would not appear to serve much purpose apart from delivery of the data and scientific formulae employed . . . ." Appendix J, p. 137a.* But plainly, in the absence of knowledge of the contents of the computer program, the Court of Appeals was in no position to know whether disclosure "would . . . serve much purpose" or not. "Because the record in this case contains no information about the programming relied upon by plaintiff's [Perma's] experts, neither

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* It is precisely this information, "the data and scientific formulae employed", that has always been required as foundation for admission of mathematical, scientific or experimental evidence. *See, e.g., Edwards* v. *Sears, Roebuck & Co.*, 512 F.2d 276, 294 (5th Cir. 1975); *United States* v. *Kelly*, 420 F.2d 26, 28-29 (2d Cir. 1969).

we [the Court] nor defense counsel have any way of knowing whether it was complete or accurate." Appendix J, p. 161a (dissenting Opinion).

The majority Opinion sought to avoid the appearance of categorically holding that disclosure of the computer program was unnecessary. Instead, it stated that Singer "has not shown that it did not have an adequate basis" for cross-examination. Appendix J, p. 137a. But this is sophistry. Without access to the program Singer was plainly in no position to demonstrate that the program was necessary for cross-examination, for establishing inaccuracies or for mounting any other appropriate attack against the computer results. In so holding, the Court of Appeals has created a conflict with decisions of other Courts of Appeal which have held that the proponent of computer-generated evidence bears the burden of laying a proper foundation. *United States* v. *Liebert,* 519 F.2d at 547; *United States* v. *Russo,* 480 F.2d at 1241-43; *United States* v. *DeGeorgia,* 420 F.2d at 893 n.11. Further, by withholding from Singer the computer program, which contained at the very least the "data and scientific formulae employed", the Court of Appeals also deprived Singer of the very information which it needed to sustain the burden now imposed upon it.

2. Disclosure of the Computer Program Is Necessary for Meaningful Cross-Examination

The Fifth, Sixth and Ninth Circuits have found that computer-generated evidence is inherently hearsay and must qualify for exception to the hearsay rule in order to be admitted.* *United States* v. *Fendley,* 522 F.2d 181, 184

*State Courts have reached the same conclusion. *See, e.g., Gassett* v. *State,* 532 S.W.2d 328, 330 (Tex. Crim. App. 1976); *Ed Guth Realty, Inc.* v. *Gingold,* 34 N.Y.2d 440, 451-52, 315 N.E.2d 441, 445-46; 358 N.Y.S.2d 367, 373-74 (1974). Commentators and other authorities are also in agreement that computer-generated evidence is hearsay. *See, e.g.,* Op. Ga. Att'y Gen. (June 12, 1973), in 4 C.L.S.R. 1325; *Manual for Complex Litigation* §§ 3.50, 2.711-.717; *Younger, Computers and the Law of Evidence* (February 25, 1975), in 173 N.Y.L.J. No. 37 at 1; *Computer-Generated Evidence,* 41 U. CHI. L. REV. at 272.

(5th Cir. 1975); *United States* v. *Russo,* 480 F.2d at 1239; *United States* v. *DeGeorgia,* 420 F.2d at 891-92. Perma has neither sought nor received a ruling that the results of its computer simulations prepared specifically for litigation qualify for exception to the hearsay rule. Thus, Perma's computer simulations were inadmissible hearsay statements of an out-of-court declarant, the computer and its program, not subject to cross-examination. Appendix J, p. 160a (dissenting Opinion).

Federal Courts, the Federal Judicial Center and the American Bar Association have recognized that if the out-of-court computer cannot be brought before the court for cross-examination, the hearsay problem may be avoided by bringing the adverse party to the out-of-court computer. This can be accomplished by either giving the adverse party access to the programmed computer, *United States* v. *Liebert,* 519 F.2d at 550; *United States* v. *Russo,* 480 F.2d at 1242-43, or by delivering the program which directed the computer in its analysis of the data to the adverse party. *United States* v. *Dioguardi,* 428 F.2d 1033, 1038 (2d Cir.), *cert. denied,* 400 U.S. 825 (1970); *Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co.,* Slip Op. at 31; *Manual for Complex Litigation* §§ 2.717, 3.50; ABA Sub-Committee on Data Processing, *Principles of Introduction of Machine Prepared Studies* (1964), in C.L.S.R. § 5-4.2.

Both alternatives are means to the same end—the avoidance of unreliable hearsay evidence by providing the adverse party with the information necessary to conduct a meaningful cross-examination and an opportunity to otherwise impeach or rebut the evidence offered against him. Either access to the programmed computer or delivery of the computer program is a "condition of admissibility", *Manual for Complex Litigation* § 2.717, for "[w]ithin this area, the protection against unreliable evidence afforded by the traditional orthodox hearsay rule can be supplied only by full disclosure [of the raw data, the

method and program employed] to the adverse party . . . ." *Manual for Complex Litigation* § 3.50.

The decision of the Court of Appeals is based upon a finding, on a record which does not contain the computer program, that Singer had not demonstrated that it could not meaningfully cross-examine Perma's expert witnesses. The decision is in conflict with other Federal Courts which have found that disclosure of the information contained in computer programs is necessary to cross-examination. The Court of Appeals for the Third Circuit found that granting access to a programmed computer:

> ". . . should provide [the adverse party] with the information necessary to cross-examine the computer testimony confronting him by analyzing the reliability of the computer system in theory and checking the accuracy of the system in fact. Moreover, the alternatives should provide information focusing directly on the credibility of the computer testimony. . . ." *United States* v. *Liebert,* 519 F.2d at 550.

Similarly, timely disclosure of a computer program has been found to be necessary to permit an adverse party "to understand fully this information before being able to commence proper analysis and subsequent preparation for thorough cross-examination." *Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co.,* Slip Op. at 31; *Manual for Complex Litigation* §§ 2.717, 3.50.

Without disclosure of the computer program containing the "logic" and assumptions as well as the "data and scientific formulae employed":

> "The inherent vice of all hearsay evidence so becomes apparent, for, at the very least, defendant had no opportunity to cross-examine [the proponent] and ascertain from him the basis of his computations; to test the validity of said basis, including whatever assumptions he made, if any, and what he did regarding the information available to him; to ascertain his

> method of computation and to test its validity, etc. For this reason we hold that it was prejudicial error to admit the evidence at the trial." *Berguido* v. *Eastern Air Lines, Inc.,* 317 F.2d 628, 632 (3d Cir.), *cert. denied,* 375 U.S. 895 (1963).

CONCLUSION

Questions relating to the admissibility of computer-generated evidence are certain to occur with increasing frequency in patent, criminal, regulatory, antitrust and other areas of federal subject matter jurisdiction. It is submitted that the dissent in the Court of Appeals is correct in urging that this is the time at which "appropriate standards be set for the introduction of computerized evidence." Appendix J. p. 158a (dissenting Opinion). This Petition affords this Court the opportunity to do so and at the same time remove a conflict that has arisen among the Circuits. For these, and for all of the other reasons set forth herein, certiorari should be granted.

Respectfully submitted,

MERRELL E. CLARK, JR.
WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street
New York, New York 10005
Attorney for Petitioner